

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Judgment reserved on: 15/02/2019

Judgment delivered on: 03/04/2019

CRA No. 1412 of 2017

- Mohammad Zahir, S/o Abdul Hamid, Aged About 31 Years R/o R Z 328 Barampuri Road, New Delhi, 46, Police-Station-Manglapuri, New Delhi.

---- Appellant

Versus

- State of Chhattisgarh Through The Police Station Saraipali, Civil & Revenue District-Mahasamund Chhattisgarh.,

---- Respondent

CRA No. 212 of 2018

- Parvin Sharma, S/o Rohtan Sharma, aged about 33 Years, R/o House No. 40, Gudgaon, Police Station-Sadar, District-Gudgaon (Haryana).

---- Appellant

Versus

- State of Chhattisgarh Through- Station House Officer, Police Station Saraipali, District Mahasamund (C.G.).

---- Respondent

&

CRA No. 1943 of 2017

- Anil Kumar, S/o Aatam Prakash, aged about 26 Years, R/o House

No. 707, Arjun Nagar, Gudgaon, District-Gudgaon Haryana.

---- Appellant

Versus

- State of Chhattisgarh Through The Police-Station-Saraipali, District-Mahasamund Chhattisgarh.

---- Respondent

For the Appellants : Mr. Punit Ruparel, Advocate in CRA

No.1412/2017

Ms. Nirupama Bajpai, Advocate in CRA

No.212/2018.

Ms. Shivali Dubey, Advocate in CRA

No.1943/2017.

For the State/Respondent : Mr. Mahesh Mishra, Panel Lawyer.

Hon'ble Shri Justice Rajendra Chandra Singh Samant

CAV Judgment

03/04/2019

1. This appeal has been preferred against the judgment of conviction and order of sentence dated 31.8.2017 passed by the learned Special Judge N.D.P.S., Saraipali, District-Mahasamund in Special Criminal Case No.06/2016 convicting the accused/appellants under Section 20(b)(ii)(c) of the [Narcotic Drugs and Psychotropic Substances Act, 1985](#) (for short 'NDPS Act') and sentencing each of them to undergo RI for 10 years with fine of Rs.1,00,000/- plus default stipulation.

2. The prosecution case, in brief, is this that on 2.10.2015 SHO K.B. Dwivedi PW-7 along with his team was checking the vehicles coming from the side of Odisha. One car Bearing Registration No. HR-26-T-4215 did not stop on signaling, which was chased and stopped. The driver of the car fled towards the jungle. The appellants in all three appeals were found traveling in the said car, who introduced themselves. They also made statement that they are bringing ganja from Banda Chowk, Sambalpur, which was purchased from Ratnakar Behra and was being transported for Kallu Thakur @ Jagdish. PW-9 Executive Magistrate Shri Atul Vishwakarma was summoned on the spot with a request to remain present during search procedure. Notice under Section 50 of NDPS Act was served upon the appellants informing them about their rights of being searched in presence of any gazetted Officer or Executive Magistrate. The appellants consented for their search by the police officer present on the spot. The police party gave their own search to the appellants in which nothing objectionable was found. Thereafter the dickey of the car was searched and 74 packets containing substance like ganja were recovered. On weightment, the same were found to be 74 kgs. Contents of the packets were taken out and after preparing homogeneous mixture of ganja available in those packets, two samples each of 100 gm were prepared and sealed in presence of witnesses. Remaining ganja of 73.800 kilogram was again

packed and sealed in the packets. Seizure of vehicle, samples, papers of vehicle, packets of ganja and other articles were made vide Ex. P-17, 18 & 19 respectively. Subsequent to that, the offence under Section 20 (c), 27(a), 28 and 29 of NDPS Act was registered against the appellants vide FIR (Ex.P-31). The appellants were arrested on the spot. Seized articles were handed over to Maalkhana Moharrir for keeping the same in the safe custody i.e. in the Malkhana of the police-station. Samples of seized articles ganja were sent for chemical examination to the FSL and according to report of FSL (ExP-34), the samples were found to be ganja. The investigation was completed and charge-sheet was filed.

3. The appellants were charged with the offence under Section 20(B)(ii)(c) of the NDPS Act. They abjured their guilt and sought trial. The prosecution in order to prove its case examined as many as 14 witnesses. Statements of appellants were also recorded under Section 313 of CrPC, in which they denied all the incriminating evidence available against them and pleaded innocence and false implication. No witness was examined in defence.
4. After completion of trial, the trial court by the impugned judgment convicted and sentenced the appellants in the manner as mentioned herein-above.
5. It is submitted by counsel for appellants in all the three cases the conviction of the appellants is bad in law, being not

supported by the evidence of cogent and clinching nature. Statement of Investigating Officer K.B. Dwivedi PW-7 was not reliable & trustworthy and further it was not supported by the evidence of independent witnesses Shripati Nayak PW-5 and Sarthi Sao PW-6. Search was not made in accordance with the procedure provided under the NDPS Act. The timings mentioned in the search and seizure memos do not match with each other, which creates doubt in the entire prosecution story. Though the samples were handed over to Rohit Kumar PW-12 for keeping it in safe custody, but he, instead of depositing the same in the Maalkhana, kept the samples with him for two days and no explanation in this regard has been offered, therefore, in this situation, the possibility of tampering with the samples cannot be ruled out. The contraband was also not produced during the trial before the trial Court. Relying on the judgment rendered in the matter of Narad Sahu Vs. State of Chhattisgarh in CRA No.712 of 2006, it is argued that failure to offer any explanation regarding non-deposit of samples into the Maalkhana creates doubt on the entire prosecution story. It is argued that it has been held in Tula Ram Vs. State of Chhattisgarh (reporting) by the learned Single Judge of this Court that non-production of ganja during the trial of a case is fatal for the prosecution.

Relying on the judgments of Supreme Court of India in Megha Singh Vs. State of Haryana reported in AIR 1995 STPL 1936 SC and Bhola Ram Kushwaha Vs. State of

Madhya Pradesh in CRA No.983/2000 judgment dated 16.11.2000, it is argued, that the evidence of prosecution does not inspire confidence. It is further argued, that the author of FIR and the investigator is one and the same person, which has been deprecated by the Supreme Court in Mohan Lal Vs. State of Punjab(reporting). Although the judgment in this case has been modified by the Supreme Court in Varinder Kumar Vs. State of Himachal Pradesh in CRA No. 2450-2451/2010 vide judgment dated 11.2.2019, but the principles laid down in Mohan Lal's case still holds ground which cannot be bypassed, therefore, the statement of Investigating Officer in this case is not reliable and trustworthy on the basis of these principles. Therefore, the conviction against the appellants is liable to be set aside.

6. Learned counsel for the State has opposed the grounds raised in this appeal as also the arguments advanced by the counsel for the appellants. It is submitted that prosecution had been able to prove its case beyond reasonable doubt by leading cogent and clinching evidence. Minor discrepancies in the procedures to be followed during investigation as also in the evidence of the prosecution witnesses cannot be made a ground to discredit the entire testimonies of the witnesses. It was a case in which the contraband was found inside the dicky of car in which the appellants were travelling and before the discovery of contraband the appellants themselves

made a statement to the Investigating Officer that they are carrying contraband in the car, which amounts to an statement under Section 27 of Evidence Act and subsequent to that, the recovery was made. As per report of FSL also, the samples sent for examination were found positive. The evidence of Investigating Officer in this case is totally reliable as it remained unshaken and unrebutted throughout. Relying on the judgment of Supreme Court in Tahir Vs. State(Delhi) reported in (1996) 3 SCC 338, it is submitted that if the testimony of Police official is found reliable, it can be made the basis for conviction. In such a case the corroboration from some independent witness is not necessary and the only rule of caution will apply, for which the Court has to give sufficient scrutiny to the evidence present on record. In Criminal Appeal No.2450-2451/2010 (Varinder Kumar Vs. State of Himachal Pradesh), the Hon'ble Supreme Court has clearly held that the ratio laid down in Mohan Lal's case (supra) cannot be allowed to become a spring board for acquittal in prosecutions prior to the same, irrespective of all other considerations. Therefore, all the appeals being without substance are liable to be dismissed.

7. In reply, it is submitted on behalf of the appellants that ratio laid down by Hon'ble Supreme Court in Mohan Lal's case (supra) is squarely applicable in the present case. The modified judgment in Varinder Kumar's case (supra) is

applicable only for the habitual offenders. Hence, the appellants are entitled for acquittal.

8. I have heard learned counsel for the parties and perused the record of the trial Court including the impugned judgment.
9. The question that requires determination in this appeal is as to whether on the basis of evidence available on record the prosecution has been able to establish guilt of accused/appellants beyond reasonable doubt ?
10. PW-7 K.B. Dwivedi, SHO of Police-Station Saraipali, has stated that they stopped the car bearing Registration No.HR-26-T-4215 and on being inquired, the appellants who were sitting in the said car, they admitted that they were transporting ganja in the said car. Thereafter, he gave notices (Ex.P-8 to P-10) under Section 50 of the NDPS Act to the appellants informing their legal right that they have option to be searched in presence of a Magistrate or in presence of a gazetted officer. However, the appellants gave their consent to be searched by him. Search memo (Ex.P-11) was prepared separately in which admission made by the appellants that they are transporting ganja in the said car has been recorded. He has further stated that when the car was searched, 74 packets were found in the dickey of said car and on physical verification vide Ex.P-13 i.e. by testing, the same were found to be containing ganja. Weighment of recovered ganja was

done vide ExP-15 and in which it was found to be 74 kg. Seizure of ganja and other articles found in the car were made vide ExP-16. He has further stated, vide Ex.P-17 two samples each of 100gm were prepared from the homogeneous mixture of the contents of all the packets and the same were marked as Articles A1 & A2 and sealed in presence of witnesses. Remaining ganja was again packed in the packets and kept in two gunny bags. One gunny bag contained 40 packets, whereas another contained 34 packets. Gunny bags were also sealed. Weight of ganja in the bags were 73.8 kg. Separate panchnama of making homogeneous mixture and preparing samples of ganja has also been prepared vide Ex.P-26. In cross-examination, he has denied the suggestion that he has made a false case against the appellants to get promotion. However, he has admitted that he has registered a number of cases under the NDPS Act. His statement that he had been to the spot on a government vehicle and he has not produced the log book is of no consequence. A question was put to him that the confession of the appellants was not recorded to which he replied that the confession was recorded vide ExP-11. He has denied the suggestion that seizure was not made on the basis of discovery statements made by the appellants. He has admitted that before sending intimation to SDO(P), Saraipali, at 15.40 hrs, he had raided and recovered ganja. At 15.45 hrs the information was sent to the Executive Magistrate. He has

also admitted that after finding ganja, he gave notice under Section 50 of NDPS Act. He has denied all the adverse suggestions given to him. He has admitted that the sample was not drawn from each packets but it was drawn after making a homogeneous mixture of the contents of all the packets. He has admitted that separate panchanama was not prepared in this respect although he has stated that all the packets were sealed. There is no such other statement made by him in cross-examination to contradict his statement in examination-in-chief.

11. The independent witnesses of search and seizure namely - Shripati Nayak PW-5 and Sarthi Sao PW-6 have not supported the prosecution case and as such they have been declared hostile by the prosecution. Although they have admitted their signatures in all the memos of search, seizure, weighment etc.

12. PW-1- Head Constable Shouki Lal Thakur, who was posted as Clerk in the office of SDO (P), has stated about receipt of information regarding raid and giving of acknowledgement vide ExP-1. Patwari Naresh Kumar PW-2 has prepared the spot map ExP-3. S.I. Vishnu Barik PW-8, a member of team, has stated about the proceeding of search & seizure and testing of narcotic substance vide ExP-13. This witness remained firm in the cross-examination.

13. Atul Vishwakarma PW-9 is the Executive Magistrate, in whose presence weighment of seized ganja was again done in police station Saraipali and the total weight of ganja was found to be 73.8 kg. Thereafter two samples were again prepared in his presence and marked as ANB. Remaining 73.6 kg of ganja was again sealed and regarding which memos of Ex.P-6 & P-7 were prepared. In the cross-examination, he has stated that he is unable to state as to what kind of seal was affixed on the seized property. He has not prepared any panchnama. He was re-examined, in which he has stated that he received the notice vide ExP-27, in which, he was informed about the recovery of ganja during checking of car bearing registration number HR26-T-4215. He has further stated that on reaching the spot at 5 p.m., he saw that 75 packets of ganja, which were kept in the dickey of car, were recovered from the joint possession of three accused persons and in this regard recovery memo of ExP-16 was prepared. He has stated that weighment of seized ganja was done vide Ex.P-15 and the same was found to be 75 kg. In re-cross-examination, he has again admitted that he was called on the spot after the recovery of ganja and before weighing the ganja he had not set the digital weighing machine at 00, but he corrected himself that after verification of zero mark, the weighment procedure was carried out.

14. S.I. Bhawesh Shende PW-11, another member of raiding

team, has supported the statement of K.B. Dwivedi PW-7. Constable Rohit Kumar PW-12 is the person who had deposited the samples with FSL, Raipur and obtained receipt (Ex.P-33) thereof. In cross-examination, he has admitted that he received two packets of samples for depositing the same in the FSL, but instead of depositing the same in the FSL, he has kept it with him for two days, for the reason that there were holidays for two consecutive days. He has admitted that during this period he did not deposit the samples in the Malkhana. However, he has denied this suggestion that during this period he had tampered with the sample packets and has deposited tampered samples with the FSL, Raipur. Sunil Agrawal PW-13 did not support the prosecution case and turned hostile.

15. Head Constable Baliram Singh PW-3 is the person who received all the articles for keeping them in safe custody in Malkhana, regarding which he has proved the entry in the registered of Malkhana vide ExP-4. In cross-examination, he has admitted that Ex.P-4 does not mention that sample packets were also given for keeping in safe custody but he has denied that no such samples packets were given to him.

16. After closely scrutinizing the evidence of all the prosecution witnesses, first objection of the appellants which is taken into consideration is whether there is any non-compliance of the mandatory provisions regarding search and seizure under the

NDPS Act. According to evidence, it is clear that K.B. Dwivedi PW-7 was on the spot simply for checking the suspicious vehicles and he had no information that any such vehicle carrying ganja would arrive there, hence, this incident occurred all of sudden. In the matter of Dilip Singh Vs. State of M.P. reported in AIR 2007 SC 369, it has been held that if a police officer without any prior information as contemplated under the provisions of the NDPS Act makes a search or arrests a person in the normal course of investigation into an offence or suspected offences as provided under the provisions of CrPC and when such search is completed at that stage Section 50 of the NDPS Act, would not be attracted and the question of complying with the requirements thereunder would not arise, because it is case of chance recovery of narcotics drugs or psychotropic substance, which appears to have happened in this case. Further, the requirement under Section 50 of NDPS is applicable only in respect of search of a person. A three Judges Bench of the Hon'ble Supreme Court in State of H.P. v. Pawan Kumar reported in AIR 2005 SC 2625 has clearly held that the word 'person' means a human being with appropriate coverings and clothings and also footwear. Thus, the provisions of Section 50 of NDPS would only apply to search of a person and not to any bag, article or container etc. being carried by a person.

17. In view of the above ratio laid down by the Supreme Court, I

am of this opinion that although the procedure under Section 50 of NDPS Act was followed but it was not necessary in this case, because in this case the search was not of the person but of a car. Thus, it cannot be said that there was any non-compliance of the mandatory provisions of the NDPS Act.

18. The variation has been observed regarding weight of ganja recovered, cannot be regarded as any material variation. Anyhow, the total weight of seized ganja exceeds the weight required to make it a “commercial quantity”. The objection raised that Rohit Kumar PW-12 kept the sample packets with himself for two days and failed to offer any explanation in this regard, is also without any substance for the reason that Rohit Kumar PW-12 has explained that due to two consecutive holidays, he could not deposit the sample with FSL. The allegation that the samples might have been tampered would have been answered in the FSL report, but the receipt of FSL, Raipur ExP-33 mentions that the samples A1 & A2 were received in sealed condition and that the packets A1 & A2 were found in sealed condition. It has also been mentioned in Ex.P-34 that packets A1 & A2 were found sealed. Therefore, this argument finds no place.

19. Further for the reason that it was a case of chance recovery, therefore, the delay in the sending the information to the SDOP cannot be regarded as fatal.

20. This case pertains to the year 2015. The Hon'ble Supreme Court in Varinder Kumar's case (supra) while considering the judgment dated 16.8.2018 passed in the matter of Mohan Lal Vs. State of Punjab reported in AIR 2018 SC 3853, has held that the ratio laid down in Mohan Lal's case shall not be applicable to the prosecutions prior to the date of delivery of judgment in Mohan Lal's case and it was clearly held that all pending criminal prosecutions, trials and appeals prior to the law laid down in Mohan Lal's case shall continue to be governed by the individual facts of the case.

21. It is true that in this case the evidence of K.B. Dwivedi PW-7 has been found unrebutted and the minor discrepancies that have been observed are not sufficient to discard his entire evidence. His statement has been further supported and corroborated by the witnesses of raiding party, although there is no independent witnesses. Apart from that the recovery and seizure of 74 kg ganja is involved, which cannot be produced or planted on the spot.

22. So far as the ground raised by the appellants that seized contraband was not produced before the trial Court during the trial and judgments relied upon in support of this submission i.e. judgments delivered in the matter of Tularam (supra) & Amarnath Soni (supra) is concerned, it would not be in the interest of justice to acquit the appellants solely on the ground

of non-production of seized contraband before the Court below during trial, particularly when there are other strong circumstances clearly indicating involvement of the appellants in the commission of crime in question. Moreover, the appellants have failed to show any prejudice being caused to them due to non-production of seized contraband before the Court during trial. It is well-settled that mere non-production of seized property does not by itself vitiate the conviction of accused, unless prejudice is shown to have been caused to the accused. Hence, I do not find any force in this submission of the learned counsel for the appellants.

23. After over all consideration of all the material present in the record of the trial Court the evidence, I am of this view that these appeals have no substance and the same are liable to be dismissed and are hereby dismissed.

Sd/-

(Rajendra Chandra Singh Samant)
Judge

Nisha